

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

BRANDON NICHOLAS MCLANE,

No. 2:23-cv-2740 DAD CSK P

Plaintiff,

V.

JAKE TOLLETT,

## ORDER AND FINDINGS AND RECOMMENDATIONS

## Defendant.

Plaintiff is a state prisoner proceeding pro se with a civil rights action under 42 U.S.C. § 1983 in which he challenges events that took place before his criminal conviction. On February 2, 2024, prior findings and recommendations were held in abeyance pending plaintiff filing an amended complaint. On February 20, 2024, plaintiff filed an amended complaint, and a motion for appointment of counsel. Subsequently, plaintiff filed another motion for appointment of counsel, and a motion for default judgment. Good cause appearing, the January 2, 2024 findings and recommendations are vacated. As discussed in more detail below, plaintiff's motions for appointment of counsel are denied, and it is recommended that plaintiff's motion for default judgment be denied, and this action be dismissed for failure to state a claim.

## Screening Standards

26 The court is required to screen complaints brought by prisoners seeking relief against a  
27 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
28 court must dismiss a complaint or portion thereof if the prisoner raised claims that are legally

1 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
 2 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

3       A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
 4 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
 5 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
 6 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
 7 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
 8 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
 9 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
 10 2000) (“[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
 11 meritless legal theories or whose factual contentions are clearly baseless.”); Franklin, 745 F.2d at  
 12 1227.

13       Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain  
 14 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
 15 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
 16 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
 17 In order to survive dismissal for failure to state a claim, a complaint must contain more than “a  
 18 formulaic recitation of the elements of a cause of action;” it must contain factual allegations  
 19 sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550 U.S. at 555.  
 20 However, “[s]pecific facts are not necessary; the statement [of facts] need only ‘give the  
 21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Erickson v.  
 22 Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal  
 23 quotations marks omitted). In reviewing a complaint under this standard, the court must accept as  
 24 true the allegations of the complaint in question, Erickson, 551 U.S. at 93, and construe the  
 25 pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236  
 26 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984).

27       The Civil Rights Act

28       To state a claim under § 1983, a plaintiff must demonstrate: (1) the violation of a federal

1 constitutional or statutory right; and (2) that the violation was committed by a person acting under  
2 the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Jones v. Williams, 297 F.3d  
3 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the  
4 facts establish the defendant's personal involvement in the constitutional deprivation or a causal  
5 connection between the defendant's wrongful conduct and the alleged constitutional deprivation.  
6 See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989); Johnson v. Duffy, 588 F.2d 740, 743-44  
7 (9th Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable  
8 for the unconstitutional conduct of his or her subordinates. Ashcroft v. Iqbal, 556 U.S. 662, 679  
9 (2009). The requisite causal connection between a supervisor's wrongful conduct and the  
10 violation of the prisoner's constitutional rights can be established in a number of ways, including  
11 by demonstrating that a supervisor's own culpable action or inaction in the training, supervision,  
12 or control of his subordinates was a cause of plaintiff's injury. Starr v. Baca, 652 F.3d 1202,  
13 1208 (9th Cir. 2011).

14 Plaintiff's Amended Complaint

15 On July 8, 2022, plaintiff was arrested by defendant Police Officer Jake Tollett and  
16 charged with possession of ammunition by a felon and possession of a controlled substance for  
17 sale. (ECF No. 14 at 3.) During his arrest, plaintiff claims he made no statement. Between July  
18 8, 2022, and August 2022, plaintiff alleges that defendant Tollett arrested Teresa Lucero, and  
19 during such arrest defendant Tollett told Lucero that plaintiff told Tollett that the ammunition  
20 plaintiff was charged with came from Lucero.

21 On October 7, 2022, plaintiff claims he called the City of Jackson Police Department and  
22 asked defendant Tollett why he was going around town telling his associates that plaintiff claimed  
23 the bullets found in plaintiff's residence were Lucero's, and Tollett stated, "That's because you  
24 did McLane." (ECF No. 14 at 3-4.) Plaintiff responded, "I'd never do that . . ." (ECF No. 14 at  
25 4.) Plaintiff repeated his question to Tollett, who then allegedly answered "Because I was  
26 confused." (Id.)

27 On November 6, 2023, defendant Tollett was called as a witness in plaintiff's criminal  
28 case, People v. McLane, 22CR13777 (Amador Co.), and testified that plaintiff told Tollett that the

1 ammunition was Lucero's. Plaintiff contends Tollett's testimony was false. Subsequently, when  
2 Tollett was asked, "At the time that you made that statement [about the ammo], did you realize  
3 that giving such information might place Mr. McLane at risk?" (ECF No. 14 at 4.) Tollett  
4 responded, "I did not." (ECF No. 14 at 4.)

5 Plaintiff claims such allegations violated his Fourteenth Amendment rights to due process  
6 and equal protection and threatened his safety. (ECF No. 14 at 3.) As injury, plaintiff states that  
7 Tollett's careless and reckless statements put plaintiff's life at risk unnecessarily and maliciously  
8 and adds: "Plaintiff alleges being attacked from Tollett's alleged statement of McLane's which  
9 never occurred." (ECF No. 14 at 3.) Plaintiff seeks, inter alia, money damages. (ECF No. 14 at  
10 5.)

11 Discussion

12 Plaintiff's factual allegations did not change from his initial complaint, and his new  
13 reliance on the Fourteenth Amendment again fails to state a cognizable civil rights claim.  
14 Plaintiff includes no facts implicating equal protection<sup>1</sup> or due process.<sup>2</sup> "[N]o substantive due  
15 process right exists under the Fourteenth Amendment to be free from prosecution without  
16 probable cause." Awabdy v. City of Adelanto, 368 F.3d 1062, 1069 (9th Cir. 2004) (citing  
17 Albright v. Oliver, 510 U.S. 266, 268 (1994)). Rather, the Fourth Amendment addresses pretrial  
18 deprivations of liberty. Here, plaintiff provides no facts showing he was arrested without  
19 probable cause in violation of the Fourth Amendment.

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21 <sup>1</sup> "The Equal Protection Clause . . . is essentially a direction that all persons similarly situated  
22 should be treated alike." City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439  
23 (1985). "To state a claim . . . for a violation of the Equal Protection Clause . . . a plaintiff must  
24 show that the defendants acted with an intent or purpose to discriminate against the plaintiff based  
upon membership in a protected class." Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir.  
2001) (quoting Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)).

25 <sup>2</sup> The Ninth Circuit has recognized "a clearly established constitutional due process right not to  
26 be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by  
the government." Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (*en banc*); see  
27 also Costanich v. Dep't of Soc. & Health Servs., 627 F.3d 1101, 1111 (9th Cir. 2010) (relying on  
Devereaux to hold that a state investigator "who deliberately mischaracterizes witness statements  
in her investigative report also commits a constitutional violation").

1 Plaintiff fails to explain how defendant's statement, allegedly made to Lucero after  
 2 plaintiff's arrest, implicated plaintiff's federal or constitutional rights. Because the statement was  
 3 made after plaintiff's arrest, no putative Fourth Amendment claim is implicated. If the alleged  
 4 false statement ultimately resulted in Lucero's arrest, only Lucero has standing to challenge her  
 5 own arrest. Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) ("[C]onstitutional  
 6 claims are personal and cannot be asserted vicariously.") (citation omitted).

7 In addition, plaintiff's passing reference to an "attack" is too vague to evaluate. He  
 8 provides no specific facts as to such attack, for example, when or where it occurred, and he does  
 9 not allege that it was defendant who attacked him. If plaintiff was attacked by Lucero or another  
 10 private citizen attempting to avenge Lucero's arrest, plaintiff could not state a civil rights claim  
 11 against any of them unless they were acting under color of state law. West, 487 U.S. at 48.

12 To the extent plaintiff wishes to challenge the police officer's alleged false testimony  
 13 against plaintiff in the state criminal proceedings, plaintiff is reminded that he must do so in such  
 14 criminal proceedings.<sup>3</sup>

15 Therefore, it is recommended that plaintiff's amended complaint be dismissed without  
 16 leave to amend. Further amendment is futile in this instance because plaintiff has been provided  
 17 an opportunity to amend but has again failed to provide additional facts to state a cognizable  
 18 claim. Thus, it appears that the deficiencies cannot be cured by amendment. See Lopez v. Smith,  
 19 203 F.3d 1122, 1127 (9th Cir. 2000); Schmier v. U.S. Court of Appeals for the Ninth Circuit, 279  
 20 F.3d 817, 824 (9th Cir. 2002) (recognizing "[f]utility of amendment" as a proper basis for

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21 <sup>3</sup> As plaintiff was previously advised, absent extraordinary circumstances, this court is barred  
 22 from directly interfering with ongoing criminal proceedings in state court. (ECF No. 7 at 3)  
 23 (citing see Younger v. Harris, 401 U.S. 37, 46 (1971); Mann v. Jett, 781 F.2d 1448, 1449 (9th Cir.  
 24 1985) ("When a state criminal prosecution has begun the Younger rule directly bars a declaratory  
 25 judgment action" as well as a section 1983 action for damages "where such an action would have  
 26 a substantially disruptive effect upon ongoing state criminal proceedings.").) Plaintiff may raise  
 27 any constitutional claims in his ongoing criminal proceedings in state court. Lebbos v. Judges of  
 28 the Superior Court, 883 F.2d 810, 813 (9th Cir. 1989) ("Abstention is appropriate based on  
 'interest of comity and federalism [that] counsel federal courts to abstain from jurisdiction  
 whenever federal claims have been or could be presented in ongoing state judicial proceedings  
 that concern important state interests.'"). Indeed, it appears from plaintiff's allegations that his  
 defense counsel questioned Officer Tollett about the statement at some point in the criminal  
 prosecution. (ECF No. 14 at 4.)

1 dismissal without leave to amend).

2 Motions for Appointment of Counsel

3 District courts lack authority to require counsel to represent indigent prisoners in section  
4 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional  
5 circumstances, the court may request an attorney to voluntarily represent such a plaintiff. See  
6 28 U.S.C. § 1915(e)(1); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.  
7 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). When determining whether “exceptional  
8 circumstances” exist, the court must consider plaintiff’s likelihood of success on the merits as  
9 well as the ability of the plaintiff to articulate his claims pro se in light of the complexity of the  
10 legal issues involved. Palmer v. Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not  
11 abuse discretion in declining to appoint counsel). The burden of demonstrating exceptional  
12 circumstances is on the plaintiff. Id. Circumstances common to most prisoners, such as lack of  
13 legal education and limited law library access, do not establish exceptional circumstances that  
14 warrant a request for voluntary assistance of counsel.

15 Having considered the factors under Palmer, the court finds that plaintiff failed to meet his  
16 burden of demonstrating exceptional circumstances warranting the appointment of counsel at this  
17 time. In his second request, plaintiff sought appointment of a specific law firm. (ECF No. 19 at  
18 2.) Plaintiff did not indicate whether the law firm had agreed to represent him. But, in any event,  
19 because the undersigned recommends that this action be dismissed, appointment of counsel is not  
20 appropriate.

21 Motion for Default Judgment

22 Plaintiff seeks entry of default judgment. However, plaintiff erroneously claims that the  
23 summons and complaint were served on defendant on February 23, 2024. To date, the court has  
24 not ordered that defendant be served, and the U.S. Marshal has not executed service on defendant.  
25 Moreover, contrary to plaintiff’s claim, clerk’s default has not been entered. Rather, plaintiff’s  
26 request for entry of default was declined on March 19, 2024. (ECF No. 18.) Finally, plaintiff’s  
27 motion for default judgment is premature and should be denied.

28 Accordingly, IT IS HEREBY ORDERED that:

- 1       1. The January 2, 2024 findings and recommendations (ECF No. 7) are vacated;
- 2       2. Plaintiff's motions for appointment of counsel (ECF Nos. 15 & 19) are denied; and
- 3       IT IS RECOMMENDED that:
  - 4       1. Plaintiff's motion for default judgment (ECF No. 20) be denied; and
  - 5       2. This action be dismissed for failure to state a claim.

6           These findings and recommendations are submitted to the United States District Judge  
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
8 after being served with these findings and recommendations, plaintiff may file written objections  
9 with the court and serve a copy on all parties. Such a document should be captioned  
10 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that  
11 failure to file objections within the specified time may waive the right to appeal the District  
12 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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14           Dated: April 26, 2024

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CHI SOO KIM  
UNITED STATES MAGISTRATE JUDGE

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